

SEP 15 2006

NOT FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JUAN CARLOS GARCIA-RUBIO,

Defendant - Appellant.

No. 05-50314

D.C. No. CR-04-02707-RTB

MEMORANDUM^{*}

Appeal from the United States District Court
for the Southern District of California
Roger T. Benitez, District Judge, Presiding

Submitted September 11, 2006^{**}

Before: PREGERSON, T.G. NELSON, and GRABER, Circuit Judges.

Juan Carlos Garcia-Rubio appeals from his 70-month sentence imposed following a guilty plea to being an alien found in the United States after

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

deportation, in violation of 8 U.S.C. § 1326. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

Garcia-Rubio contends that the district court erred in imposing a sentence longer than the two-year statutory maximum set forth by 8 U.S.C. § 1326, because the commission of a prior aggravated felony was neither alleged in the indictment nor proved to a jury beyond a reasonable doubt. Garcia-Rubio acknowledges that *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), forecloses this contention, but seeks to preserve the issue on direct appeal. Garcia-Rubio's contention remains foreclosed. *See United States v. Weiland*, 420 F.3d 1062, 1079 n.16 (9th Cir. 2005).

Garcia-Rubio further contends that the district court erred in enhancing his sentence based upon a prior conviction for a felony crime of violence. Garcia-Rubio is mistaken. The record reflects that the district court enhanced his sentence based upon a prior alien smuggling offense pursuant to U.S.S.G.

§ 2L1.2(b)(1)(A)(vii). This Court has rejected the argument that a prior conviction must be admitted, or alleged in the indictment and proved to a jury beyond a reasonable doubt, in order to enhance a defendant's offense level under the Sentencing Guidelines. *See United States v. Beng-Salazar*, 452 F.3d 1088, 1091 (9th Cir. 2006).

Garcia-Rubio also contends that his sentence is unreasonable under *United States v. Booker*, 543 U.S. 220 (2005), because his sentence is disparate as compared to the median sentence imposed on other defendants convicted of illegal reentry, and because the court declined to grant a criminal history departure. The disparity between Garcia-Rubio's sentence and those of other defendants is not unwarranted in light of Garcia-Rubio's extensive criminal history and his rejection of an earlier plea offer. *See United States v. Plouffe*, 445 F.3d 1126, 1131-32 (9th Cir. 2006) (sentencing disparity did not render sentence unreasonable because defendants had different criminal histories). Further, the district court considered Garcia-Rubio's criminal history at length, and in a reasoned manner. *See United States v. Rodriguez-Rodriguez*, 441 F.3d 767, 770-71 (9th Cir. 2006). We conclude that Garcia-Rubio's sentence, at the low end of the applicable Guidelines range, was not unreasonable in light of the factors set forth by 18 U.S.C. § 3553(a). *See Rodriguez-Rodriguez*, 441 F.3d at 770-71.

AFFIRMED.